No. 07-1555

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SUPREME COURT, U.S.

In The Supreme Court of the United States

GERMAR SCHEERER, A/K/A GERMAR RUDOLF,

Petitioner,

v.

MICHAEL B. MUKASEY, U.S. ATTORNEY GENERAL; MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF SUBMITTED PURSUANT TO SUP. CT. RULE 15.6

Pursuant to Sup. Ct. R. 15.6, "[a]ny petitioner may file a reply brief addressed to new points raised in the brief in opposition . . . ."

In opposition to Petitioner's petition for writ of *certiorari*, Respondents argue, *inter alia*, that Petitioner's petition is essentially moot, as he cannot avail himself of any relief. Opp. to Pet. 21-23. Specifically, Respondents assert that ". . . petitioner has failed to show that this Court's review is necessary in order to permit him to obtain any concrete benefit. Petitioner has already been removed from the United States. As a result, there would be no way for him to realize the principal benefit of obtaining lawful permanent residence by way of adjustment of status, *i.e.*, the ability to do so *without* being required to depart from the United States and pursue lawful permanent resident status from abroad." Opp. to Pet. 22 (citing *Randall* v. *Meese*, 854 F.2d 472, 473-474 (D.C. Cir. 1988) (R.B. Ginsburg, J.), cert. denied, 491 U.S. 904 (1989)). In support of this contention, Respondents maintain that because adjustment of status is a form of relief that "cannot be pursued from outside the United States," Petitioner's deportation to, and present incarceration in, Germany precludes his ability to seek *certiorari* review. Opp. to Pet. 22 (citing 8 U.S.C. 1255(a), 8 C.F.R. 245.1(a)). Respondents further argue that *certiorari* review is inappropriate because upon Petitioner's eventual release from prison in Germany, he will then have "avenues for seeking lawful permanent residence. . . .other than

an application for adjustment of status."[1] Opp. to Pet. 22 (citing 8 U.S.C. 1151(b)(2)(A)(i), 1154(a)(1)(A)(i), 1201(g), 1202(a); 8 C.F.R. 204.1(e)(2) and (3)) (noting that Petitioner is the beneficiary of an approved I-130 immediate relative visa, making him "eligible to seek an immigrant visa from an overseas consular officer").

A case should only be "'dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant." *Calderon v. Moore*, 518 U.S. 149 (1996) (citing *Mills v. Green*, 159 U.S. 651, 653, (1895)). Contrary to Respondents' contention, Petitioner's deportation *does not* preclude this Court's grant of effectual relief to Petitioner and, therefore, does not bar *certiorari* review. Indeed, if this Court overturns the Eleventh Circuit's decision on review, Petitioner will not only be permitted automatic re-entry to the United States upon his release from German prison, but also consideration of his adjustment of status application on the merits. *See, e.g.*, *Singh v. Waters*, 87 F.3d 346, 350 (9th Cir. 1996) (Court has authority to order DHS to permit alien "to return to the United States for the purpose of appearing at a hearing before the immigration

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[1] Respondent's argument is disingenuous; as Respondent makes this argument, Respondent simultaneously acknowledges that "as a result of having been removed from the United States, petitioner is now subject to a period of inadmissibility." Opp. to Pet. 22 (citing 8 U.S.C. 1182(a)(9)(A)(i) and (ii)). Such a bar, removable only at the discretion of the Secretary or his designee USCIS, see 8 U.S.C. 1182(a)(9)(A)(iii), would preclude Petitioner from seeking lawful permanent residence for ten (10) years. *See* 8 U.S.C. 1182(a)(9)(A)(ii).

judge to determine whether discretion to adjust his status should be favorably exercised"); *Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 1167 (9th Cir. 2005) (If petitioner is eligible to show that he was unlawfully removed from the country he "will be entitled to relief available at the time of his original hearing"); *Edwards v. I.N.S.*, 393 F.3d 299, 309 (2d Cir. 2004) (*nunc pro tunc* relief is appropriate to remedy error in immigration proceedings); *Dragon v. I.N.S.*, 748 F.2d 1304, 1307 (9th Cir. 1984) (BIA abused its discretion by failing to fully consider application nunc pro tunc to reenter the United States and reopen removal proceedings where granting such relief would allow for complete disposition of the case on the merits); *Matter of Rapacon*, 14 I&N Dec. 375, 378 (BIA 1973) (application for permission to reapply for admission to the United States after deportation can be granted nunc pro tunc where appropriate). *See also*, *Rivera v. Ashcroft*, 394 F.3d 1129, 1140 (9th Cir. 2005) ("the Constitution is violated when a person with a non-frivolous claim to U.S. citizenship is deported without receiving a judicial determination of that claim"); *Iavorski v. U.S. I.N.S.*, 232 F.3d 124, 130 (2d Cir. 2000) (equitable remedy of *nunc pro tunc* relief "has long been available under immigration law"); *cf. Zalawad v. Ashcroft*, 371 F.3d 292 (5th Cir. 2004) (court has authority to "order the BIA to correct its mistakes" and order an alien returned to the United States after removal pursuant to a petition for review). Moreover, the fact that Petitioner may or may not be able to return to the United States through other means in the distant future affords Petitioner with no current, cognizable relief – relief he is presently entitled to seek from this Court.

Certiorari review in this case is not only not moot, it is in fact necessary to declare and preserve the rights of Petitioner as well as potentially hundreds and thousands of aliens similarly situated.

CONCLUSION

For the aforementioned reasons and those discussed in both the initial and supplemental petitions, Petitioner's petition for writ of *certiorari* should be granted.

Respectfully submitted,

/s/

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